No. 92-958

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM,

JAMES PICKREL,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether, in the interest of comity, federal courts should defer to a state's more stringent exclusionary rule with respect to evidence seized by state officials with no federal involvement?

2. Whether probable cause exists for a second search of a residence where an earlier search of the residence uncovered evidence of drug trafficking, but no new information was submitted to the magistrate in support of the second search other than the results of the first search?

3. Whether a search warrant generally authorizing the search of "any vehicles" found at a residence is so overbroad that it constitutes a "general warrant?"

4. Whether the search of a vehicle located in an "outbuilding" not referred to in the search warrant impermissibly exceeded the scope of the warrant?

5. Whether a search warrant authorizing the search of precious metals or gems, tape recordings, records of real estate purchases, records of vehicle purchases, computer records and systems, photo albums, diaries, and other evidence of criminal conspiracy, criminal racketeering or the facilitation of criminal activity, as well as evidence concerning controlled substances must be deemed to be overbroad.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than petitioner. In the court below, there were four defendants, James Pickrel (petitioner), Joseph Jay Pickrel, Marven Ellis Broxson and Danny Lee Endicott. Petitioner and each defendant filed separate appeals in the United States Court of Appeals for the Ninth Circuit. Their cases were subsequently consolidated in that court.

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No.

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OCTOBER TERM,

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Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The opinion of the Court of Appeals filed on June 2, 1992, was not published. A copy of that opinion is attached to this petition as Exhibit A. *United States v. James Pickrel*, United States Court of Appeals for the Ninth Circuit, No. 91-30064.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1992. Jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28 of the United States Code.

The Petition for rehearing by JOSEPH JAY PICKREL was denied and the suggestion for rehearing en banc was rejected by the Court of Appeals on September 1, 1992. A copy of that Order is attached as Exhibit A.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Amendment IV, Constitution of the United States. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On April 5, 1990, a seven-count indictment was returned charging the petitioner, together with three co-defendants, with Conspiracy to Possess with Intent to Distribute Methamphetamine, a schedule II controlled substance. Petitioner was also charged with two substantive counts of possession of methamphetamine with intent to distribute. On May 3, 1990, a superseding indictment was filed charging petitioner with Conspiracy to Manufacture Methamphetamine, as well as the earlier charged counts. Petitioner pled not guilty to all counts.

Petitioner filed motions to quash the search warrants and suppress evidence, as well as a motion to traverse and controvert the search warrant affidavits. After oral arguments on the motions, the district court judge denied the motions with the exception of ordering the suppression of a small amount of evidence.

On October 29, 1990, petitioner entered a conditional plea of guilty to Count I of the superseding indictment. Petitioner was sentenced to 168 months in prison, as well as a three year term of supervised release. On June 2, 1992, the United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction in an unpublished decision.

The charges in this case arose from evidence seized pursuant to two search warrants. The warrants were issued by a state court judicial officer. The first search warrant was executed on May 30, 1989, and authorized the search of both "the property located off Highway 227, east of Canyonville on Tax Lot 401; T.30, S.R.5W Sec.27 Douglas County, Oregon" (Lot 401) and "the residence located at 15084 Tiller Trail Highway, Canyonville

(Sic), Oregon" (Tiller Trail I). The second search warrant was executed on October 24-25, 1989 at the same Tiller Trail address (Tiller Trail II).

The Lot 401 and Tiller Trail I search warrants were issued on the basis of an affidavit prepared by a senior trooper with the Oregon State Police and a member of the Douglas County Interagency Narcotics Team (D.I.N.T.). The affiant relied on information from another officer concerning observations of suspicious activities in a wooded area near a small town. The officer had initially obtained information from a "citizen informant." The officer then went to the "Lot 401" property and observed tents, barrels of chemicals, a truck and other indicia of criminal activity. The truck that the officer observed on the property was registered to the petitioner at the Tiller Trail address.

The search warrant for the Tiller Trail I search authorized, among other things, the search of "any vehicles", as well as the "residence" located at the Tiller Trail property, located on the property. While conducting the search, the officers searched a large structure, unconnected to the residence, which contained a storage room and auto stall, as well as a "horse trailer" located in the auto stall. This search uncovered incriminating evidence against the petitioner. The officers also searched a locked "grain silo" located under the structure where additional incriminating evidence was found. The District Court found that the "silo" portion of the search exceeded the scope of the warrant. However, it ruled that the rest of the evidence seized was admissible.

On October 22, 1989, the same affiant submitted a 94 page search warrant affidavit in support of the Tiller Trail II warrant. The affidavit contained no new information with respect to petitioner or the Tiller Trail property other than the results of the earlier searches. It also stated that petitioner's brother was responsible for the "Lot 401" lab and that petitioner was merely "working" for his brother. The affidavit also stated that petitioner was not the owner or power subscriber at the Tiller Trail property.

Based on the affidavit, the Tiller Trail II search warrant was issued. In contrast to the earlier warrant issued for this property, this warrant specified the "persons, vehicles, dwellings, buildings

and out buildings" located at 15084 Tiller Trail Highway, Days Creek, Oregon.

The charges against petitioner were initially filed in the state court. After petitioner filed a motion to suppress in the state court, the state prosecutor moved to dismiss the case because the evidence obtained in the search would not have been admissible under Oregon state law. (*See State v. Dixon/Digby*, 307 Or 195, 766 P.2d 1015 (1988); ORS 164.245). Up to the time of the filing of the case in federal court, there had been no federal participation or involvement in any aspect of the case.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER, IN THE INTEREST OF COMITY, FEDERAL COURTS SHOULD DEFER TO A STATE'S MORE STRINGENT EXCLUSIONARY RULE WITH RESPECT TO EVIDENCE SEIZED WITHOUT FEDERAL INVOLVEMENT

The searches in this case were conducted by state law enforcement officers pursuant to warrants issued by state court magistrates. Prior to the filing of the case in the federal court, there had been no involvement by federal officials of any type. The case against petitioner was initially filed in state court but was dismissed when it became apparent that the seized evidence violated the Oregon State Constitution. (*See State v. Dixon/Digby*, 307 Or 195, 766 P.2d 1015 (1988); ORS 164.245).

Both the District Court and the Court of Appeals summarily determined that no justification existed to exclude in a federal prosecution evidence illegally seized by state officials acting independently of federal authorities. *See* Exhibit B at p. 6

The ruling of the court below allows state officers to violate state law with impunity in situations where, as in this case, concurrent federal jurisdiction exists for filing criminal charges. Not only does the ruling below completely emasculate a state's exclusionary rule, it violates the basic principles of comity and fairness essential to the effective working of the state courts.

Under the ruling of the Court of Appeals, state prosecutors who are faced with evidence that might be suppressed in a state court have the option of "going across the street" and having a federal prosecutor file a case.

This Court has never squarely decided the issue raised in this petition and addressed in numerous federal appellate cases. *See United States v. Moore*, 956 F.2d 843, 846 (8th Cir. 1992); *United States v. Chavez-Vernazza*, 844 F.2d 1368 (9th Cir. 1987); *United States v. Pforzheimer*, 826 F.2d 200 (2nd Cir. 1987); *United States v. Rickus*, 737 F.2d 360 (3rd Cir. 1984) In *Preston v. United States*, 376 U.S. 364, 366 (1964) this Court stated that when ruling on the admissibility of evidence obtained by state officers in violation of the *Fourth Amendment* and used against a defendant in a federal prosecution, the reasonableness of the search is to be judged as if the search was conducted by federal officers. However, this ruling does not apply to searches conducted by state officers that violate state constitutions.

This Court should grant certiorari to decide the issue raised in this petition. As noted above, the present state of the law in the federal appellate courts totally undercuts the principle established by this Court that state courts may interpret their own constitutions more restrictively than the United States Supreme Court has interpreted an equivalent provision of the United States Constitution. *See Oregon v. Haas*, 420 U.S. 714, 719-20 (1975). This is particularly true at the present time where almost all "narcotics" and "drug" type offenses may be prosecuted under federal or state law.

The present state of the law encourages state officials to either violate or overlook state law with the knowledge that their case will be "bailed out" by federal officials who can circumvent state law. Such a situation is untenable and must be remedied. To condone the clearly illegal conduct of state law enforcement officers by allowing them to pursue their case in federal court makes a mockery of state law, and provides incentive for state police officers to run roughshod over rights protected by state constitutional and statutory law.

Certiorari should be granted so that this Court can rule that evidence seized by state officials in violation of state constitutional law and with no federal involvement, cannot be handed over to federal prosecutors and admitted in federal proceedings.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY WHAT CONSTITUTES PROBABLE CAUSE FOR THE ISSUANCE OF A SECOND SEARCH WARRANT FOR THE SAME RESIDENCE WHEN THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT CONTAINS NO NEW INFORMATION REGARDING CRIMINAL ACTIVITY BY ANYONE ASSOCIATED WITH THE RESIDENCE

As noted above, the affidavit in support of the Tiller Trail II warrant contained *no* new information with respect to petitioner or the Tiller Trail property other than the results of the earlier searches. The affidavit did state that petitioner's brother was responsible for the "Lot 401" lab and that petitioner was merely "working" for his brother at the time that lab was discovered. The affidavit also stated that petitioner was not the owner or power subscriber at the Tiller Trail property. However, the affidavit contained absolutely no new evidence to support a finding of probable cause that the petitioner was *currently* engaged in criminal activity or that evidence of illegal activity would be found on the premises.

The only information in the 94 page affidavit relating to James Pickrel was that he was arrested in the past on charges relating to the manufacture and possession of Methamphetamine, and that a search that took place six months earlier uncovered evidence linking James Pickrel with the manufacture and possession of Methamphetamine. The affidavit contained no information tending to show that James Pickrel was *presently* involved in any way in any type of criminal activity.

The Ninth Circuit in ruling on this issue noted that "although it is a close question" the affidavit contained information linking the petitioner to the methamphetamine ring. *See* Exhibit B at p. 5. The court further noted, based on its holding in *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986), that probable

cause existed because "with respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity." *Id.* at 1399.

The ruling by the Ninth Circuit creates a situation where once an individual is arrested and found in possession of contraband probable cause automatically extends to search that person's residence at any time. This ruling violates the standard that in deciding whether probable cause exists for the issuance of a warrant, a magistrate must determine whether there is a "fair probability" that evidence of criminal activity is currently present in the place sought to be searched. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 238-39 (1983); *Sgro v. United States*, 287 U.S. 206 (1932).

The decision by the Ninth Circuit ignores long standing rules set out by this court and seemingly creates a "drug trafficking" exception whereby once a residence is searched and evidence of drug trafficking is found, no new evidence is required to support a subsequent search of the same residence. The affiant need only let the issuing magistrate know that a previous search was successful.

This Court should grant certiorari to overrule the dangerous precedent set out by the Ninth circuit in *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986), and relied upon in this case, and to set guidelines as to what will constitute probable cause for subsequent searches after an initial search uncovers contraband.

CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN SET GUIDELINES WITH RESPECT TO WHEN A SEARCH WARRANT AUTHORIZING THE SEARCH OF "ANY VEHICLES" FOUND AT A LOCATION WILL BE SO OVERBROAD THAT IT CONSTITUTES A GENERAL WARRANT

The search warrant for the Tiller Trail I search authorized, among other things, the search of "any vehicles", as well as the "residence" located at the Tiller Trail property. located on the property. The Ninth Circuit ruled that this language was not over broad because the affidavit for the warrant noted that "individuals involved in the illegal manufacture of methamphetamine often

transport the drugs using whatever vehicles may be on hand." See Exhibit B at p. 4.

The Fourth Amendment to the United States Constitution provides in part "No warrant shall issue, but upon probable cause, supported by oath or affirmation *and particularly describing the place to be searched* and the persons or things to be seized." U.S. Const. amend. IV.

The purpose of the particularity requirement is to avoid general searches. As this court has long stressed, a warrant must leave nothing to the discretion of the officer executing the warrant, as well as particularly describing those things to searched. *See Marron v. United States*, 275 U.S. 192 (1927). The evil to be prohibited in generalized warrants is the "exploratory rummaging in a person's belongings." *Andressen v. Maryland*, 427 U.S. 463 (1976).

The authorization in the warrant to search "any vehicles" located at 15084 Tiller Trail Highway was so overbroad as to constitute a "general warrant" unsupported by probable cause to believe that evidence of criminal activity would be found in any vehicle located on the property. There was no evidence presented to the magistrate to support a finding that the petitioner was the owner of the property or a lessee thereof and there was no indication that petitioner was in control of the entire property.

At the very least, a search warrant affidavit must show that ". . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). Here, the affidavit sets forth no basis to believe that contraband or evidence thereof would be found in all vehicles located on the Tiller Trail property.

Upholding a search warrant generally authorizing the search of all vehicles located on a piece of property, when the affidavit is devoid of any information showing that the vehicles may be related to criminal activity, would permit the search of totally innocent vehicles for which no probable cause existed. For example, the search warrant would permit the officers to search a delivery vehicle on the property at the time the officers executed the warrant. Similarly if an innocent guest was visiting one of the

other residents of the property, the search warrant would authorize the search of that vehicle as well. Clearly, the affidavit in this case provided no basis for finding probable cause that all vehicles found on the premises would contain contraband or evidence thereof. (See LaFave, Search and Seizure (2d ed.), section 4.5(d) and cases cited therein) (warrants generally naming all vehicles are particularly vulnerable to challenge with respect to description). However, the Ninth Circuit summarily ruled that the warrant was not overbroad. This court should grant certiorari to delineate precise standards for determining when a warrant will be deemed to be so overbroad that it constitutes a general warrant.

THIS COURT SHOULD GRANT CERTIORARI TO DELINEATE A STANDARD TO DETERMINE WHEN OFFICERS EXECUTING A SEARCH WARRANT EXCEED THE SCOPE OF THE WARRANT

While executing the search at 15084 Tiller Trail Highway, the officers conducted a full scale search of a large structure, unconnected to the residence, containing a large metal storage room and a one bay auto stall. The auto stall and structure contained a Chevy Blazer and horse trailer which were located and searched.

A search of the trailer uncovered numerous containers of chemicals and various items of alleged incriminating equipment. The officers also searched a locked "grain silo" located under the structure. This search uncovered marijuana, methamphetamine, scales, money and identification for James Pickrel. The silo portion of the search was found to be overbroad by the District Court because it constituted a search of an "outbuilding" not named in the warrant. The District Court correctly noted that the warrant, by its express terms, did not authorize the search of "outbuildings."

The Ninth Circuit ruled that the officers, in searching the trailer, did not exceed the scope of the warrant because the warrant authorized the search of "any vehicles." See Exhibit B at p. 4-5. However, the court overlooked the fact that the trailer was located in an "outbuilding" not authorized by the warrant.

The ruling of the Ninth Circuit, if allowed to stand, creates a situation where officers may, while at a location, rummage through areas not authorized by the warrant in hopes of finding some evidence that does comport with the terms of the warrant. If they succeed, the evidence will be admitted. This Court should grant certiorari to delineate a standard to determine when officers executing a warrant exceed the scope of the warrant. The ruling by the Ninth Circuit sets a dangerous precedent of "anything goes" in the execution of a search warrant that should not be permitted to stand.

THIS COURT SHOULD GRANT CERTIORARI TO SET GUIDELINES FOR DETERMINING WHEN THE LANGUAGE OF A SEARCH WARRANT WHICH AUTHORIZES THE WHOLESALE SEIZURE OF ITEMS THAT ARE NOT EVIDENCE OF CRIMINAL ACTIVITY WILL BE DEEMED OVERBROAD

the Tiller Trail II search warrant authorized the officers to search for, *inter alia*, precious metals or gems, tape recordings, records of real estate purchases, records of vehicle purchases, computer records and systems, photo albums, diaries, and other evidence of criminal conspiracy, criminal racketeering or the facilitation of criminal activity, as well as evidence concerning controlled substances.

In the court below, petitioner argued that this language was overbroad in that it authorized the wholesale seizure of items of evidence not related to criminal activity. The Ninth Circuit summarily rejected this argument without stating its rationale. *See* Exhibit B at pp.3-4, 6.

In *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986), a search warrant for the defendant's home and business authorized the seizure of "notebooks, notes, documents, address books, and other records; safe deposit box keys, and other assets; photographs, equipment including electronic scanning devices, and other items and paraphernalia, which are evidence of violations of 18 U.S.C. 1084, 1952, 892-94, 371, 1503, 1511, 2314, 2315, 1962-63." The trial court granted the defendant's suppression motion on the grounds that the search warrant was overbroad.

Judge (now Justice) Kennedy, writing for the Ninth Circuit, affirmed the trial court's decision. The court stressed that the warrant authorized the "wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide[d] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Id.*

The warrant in this case, like the warrant in *Spilotro*, authorized the "wholesale seizures of entire categories of items not generally evidence of criminal activity." *Id.* Moreover, the warrant provided no guidelines for officers to distinguish items relating to lawful activity from those items the government may have had probable cause to seize. This is particularly true in light of the fact that numerous people resided at the location and petitioner was neither the owner of the property or person in control of the property.

This court should grant certiorari to settle the question of what guidelines must be set forth in a warrant to guide officers in distinguishing items used lawfully from those the government has probable cause to seize. Until such standards are set forth by this Court, law enforcement agents will be able to do as they please while executing search warrants.

CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 2, 1992.

DATED: November 24, 1992

Respectfully submitted,

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JAMES PICKREL

APPENDIX A

FILED SEPTEMBER 1, 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH JAY PICKREL,
Defendant-Appellant.

No. 91-30062 D.C. No. CR-90-60026-1-REJ

ORDER

Before: HALL, O'SCANNLAIN, and LEAVY, Circuit Judges

The panel has voted to deny Joseph Jay Pickrel's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

FILED JUNE 2, 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH JAY PICKREL,
Defendant-Appellant.

No. 91-30062 D.C. No. CR-90-60026-1-REJ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES PICKREL,
Defendant-Appellant.

No. 91-30064 D.C. No. CR-90-60026-2-REJ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARVEN ELLIS BROXSON,
Defendant-Appellant.

No. 91-30066 D.C. No. CR-90-60026-3-REJ

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANNY LEE ENDICOTT,
Defendant-Appellant.

No. 91-30304 D.C. No. CR-90-60026-4-REJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted March 6, 1992**
Portland, Oregon

Before: HALL, O'SCANNLAIN, and LEAVY, Circuit Judges.

Joseph Pickrel, James Pickrel, Marven Broxson, and Danny Endicott were arrested and charged with various crimes relating to the manufacture, possession, and distribution of methamphetamine. In exchange for the government's promise to recommend leniency at sentencing, Endicott agreed to testify against his coconspirators and pleaded guilty to one count of conspiring to manufacture methamphetamine, for which he received a sentence of probation. Shortly thereafter, Endicott's three codefendants entered conditional guilty pleas to one count each of conspiring to manufacture and distribute methamphetamine, for which they received substantial prison sentences. Endicott's probation was later revoked and he also was sentenced to prison.

On appeal the defendants have raised a host of issues, arguing, *inter alia*, that the district court erred by holding that methamphetamine is a controlled substance, by denying motions to suppress evidence seized as the result of unlawful searches, and

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* This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Submitted on the briefs and records as to No. 91-30304 only. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

by imposing unlawful sentences. We affirm the convictions and uphold the sentences.[1]

I. 91-30062 — *Joseph Pickrel*

The gist of Joseph Pickrel's first argument is that, because methamphetamine is a lawful ingredient of certain over-the-counter drugs, he should not have been subjected to prosecution for the unlawful manufacture and distribution of a controlled substance. We have repeatedly rejected this argument. *See, e.g., United States v. Housley*, 955 F.2d 622, 623 (9th Cir. 1992) (per curiam); *United States v. Durham*, 941 F.2d 886, 889-90 (9th Cir. 1991); *United States v. Caperell*, 938 F.2d 975, 978-79 (9th Cir. 1991).

Joseph Pickrel next argues that the so-called 311 Riddle search was invalid because the authorities lacked probable cause therefor. We disagree. The lengthy affidavit in support of the search warrant sets out in detail the long train of facts leading to the authorities' suspicion of his activities. Moreover, Pickrel does not clearly identify what, if any, misstatements or omissions in the affidavit show a lack of "a substantial basis for [the magistrate's] conclu[sion] that the affidavit in support of the warrant established probable cause." *See United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991) (per curiam). Accordingly, it cannot be said that there was no substantial basis for the magistrate's determination that the affidavit established probable cause for the issuance of the 311 Riddle search warrant.

Joseph Pickrel also contends that the search warrant's listing of property subject to search and seizure was overbroad, and this defect could not be cured because the authorities failed to act in good faith. On the contrary, the warrant plainly identifies the

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[1]By our count the appellants have raised at least fourteen separate and distinct issues in this consolidated appeal, a total that does not include issues arising out of motions originally presented by one defendant and joined in by one or more codefendants. In light of this overlap, and because we find no merit to any of the appellants' arguments, we decline to discuss the specifics of every issue raised by each appellant.

premises to be searched, and goes to greath lengths to specify the subject matter of the search. The search warrant does not suffer from terminal overbreadth.[2] *See United States v. Schmidt*, 947 F.2d 362, 371-73 (9th Cir. 1991).

II. 91-30064 — *James Pickrel*

James Pickrel's initial argument is that the first search warrant executed at his Tiller Trail residence was overbroad because it authorized the executing officers to search "any vehicles" on the premises. We reject this contention. Detective McLain's affidavit pointed out, *inter alia*, that individuals involved in the illegal manufacture of methamphetamine often transport the drugs using whatever vehicles may be on hand, that both James Pickrel and a pick-up truck, subsequently identified as belonging to him, had been observed at a rural drug lab, and that the truck reeked of methamphetamine. The district court did not err on this point.

James Pickrel's argument that the executing officers exceeded the scope of their search warrant, which only authorized them to search the Tiller Trail resident, in equally meritless. Although the district court held that the term "residence" did not include "outbuildings", the judge went on to note that the warrant authorized the search of any "vehicles" found on the property. The outbuilding in question contained the appellant's truck and a horse trailer, both of which unquestionably qualify as "vehicles". Indeed, to hold as the appellant urges would require "residence" and "vehicles" to be read in such strict conjunction that, practically speaking, only a vehicle found *inside* the residence would be subject to search. There was no error on this point.

James Pickrel contends that no probable cause existed to support the second search of his residence because, *inter alia*, the search warrant's supporting affidavit contained no new informa-

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[2]By holding as we do, we need not and do not reach the merits of the appellant's argument that the executing officers lacked good faith, nor of the government's contentions that (1) the overbreadth issue is moot because only admissible evidence was seized, (2) the warrant was not overbroad in any event, and (3) the officers acted in good faith.

tion regarding the appellant's criminal activities subsequent to the initial search. Although it is a close question, the affidavit does contain information obtained after the first search, information which ties him to the methamphetamine ring.

In addition, the affidavit discusses both the length of time in which evidence of drug trafficking may remain at a location, and that such evidence is likely to be found in, *e.g.*, homes, businesses and cars. This is less a problem of staleness, as argued by the parties, than it is a question of an ongoing activity. *Cf. United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) ("With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity"). In light of these considerations, the district court's finding of probable cause was not erroneous.

James Pickrel next argues that the second Tiller Trail search warrant was overbroad, due to a lack of sufficient particularity. With the exception of the identification of the place to be searched, the language of the so-called Tiller Trail II warrant is virtually identical to that of the 311 Riddle warrant unsuccessfully challenged by Joseph Pickrel. Accordingly, and for the reasons already set forth above, this contention must fail.

James Pickrel's argument that the evidence admitted against him was obtained in violation of state law must also be rejected. *See United States v. Chavez-Vernaza*, 844 F.2d 1368, 1373 (9th Cir. 1988) (as amended) ("[T]he admissibility of evidence in federal court is governed by federal rather than state standards"). *Accord, United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) ("[T]he validity of a search conducted by state law enforcement officers is ultimately a question of federal law").

III. 91-30066 — *Marven Broxson*

Marven Broxson argues, *inter alia*, that the district court erred by denying him a four-point reduction in the calculation of his offense level, based on Broxson's contention that he was only a minimal participant in the conspiracy to manufacture and distribute methamphetamine. We disagree.

A defendant's offense level may be decreased by four levels "[i]f the defendant was a minimal participant in [the] criminal activity". U.S.S.G. § 3B1.2(a) (Nov. 1990). Examples of minimal participation would be "someone who played no other role in a very large drug smuggling operation than to offload part of a single [drug] shipment, or . . . an individual . . . recruited as a courier for a single smuggling transaction involving a small amount of drugs." *Id.*, comment. (n.2).

The record shows that Broxson's degree of involvement in the drug ring was both continuous and long-term, and considerably more extensive than either of the two examples cited. Accordingly, his participation in the offense charged cannot be characterized as minimal. *Cf. United States v. Deeb*, 944 F.2d 545, 547-48 (9th Cir. 1991) (record did not support defendant's contention that his ignorance and low-level participation in crime charged entitled him to reduction of offense level), *cert. denied*, 112 S. Ct. 1597 (1992).

Broxson also contends that he did not know about the quantity of drugs seized at James Pickrel's residence, and this ignorance bars him from being held accountable for the full amount of drugs involved in the conspiracy. We reject this argument.[3]

"If a defendant is convicted of a conspiracy . . . involving a controlled substance, the offense level shall be the same as if the object of the conspiracy . . . had been completed." U.S.S.G. § 2D1.4 (Nov. 1990). Illustration e to U.S.S.G. § 1B1.3, comment. (n.1), which is applicable to section 2D1.4, provides an example of the kind of situation in which a defendant convicted of a drug conspiracy should not be held accountable for the full extent of that conspiracy's activities. The record shows that Broxson's involvement in the facts of this case goes well beyond that kind of limited activity. Accordingly, the district court did not err by holding him accountable for the full amount of the methamphetamine involved in the conspiracy. *See United States*

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[3]By reaching the merits of this argument, we necessarily decline to discuss the government's contention that Broxson lacks standing to challenge the searches of either James or Joseph Pickrel's residences on the ground of a lack of any privacy expectation on Broxson's part.

v. Aichele, 941 F.2d 761, 766 (9th Cir. 1991). *Cf. United States v. Johnson*, 956 F.2d 894, 906-907 (9th Cir. 1992) (applying limitation of U.S.S.G. § 1B1.3, comment. (n.1), to minor participant in conspiracy who was in police custody at time of subsequent acts of coconspirators).

IV. 91-30304 — *Danny Endicott*

Danny Endicott first argues that, by virtue of the court having granted the government's initial request for a downward departure pursuant to U.S.S.G. § 5K1.1, the sentence subsequently imposed (viz. for probation violation) was excessive. We disagree.

The district court originally sentenced Endicott to a period of probation subject to conditions mandated by 18 U.S.C. § 3563(a)(3). However, whenever a defendant so sentenced "is [subsequently] found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court *shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence*." 18 U.S.C. § 3565(a) (emphasis added).

We recently held that a defendant who violated his probation by possessing methamphetamine was subject to resentencing to prison for a period of not less than one-third of the amount of his probationary term, *i.e.*, "original sentence" under section 3565(a) means the period of probation to which the court actually sentenced the defendant, and not the amount of time to which the defendant originally could have been imprisoned under the Sentencing Guidelines. *United States v. Corpuz*, 953 F.2d 526, 529 (9th Cir. 1992) (defendant, originally sentenced to three years' probation instead of prison, resentenced to one year in prison, i.e., one-third of probationary term). Because Endicott's four-year prison sentence is "not less than one-third of the original sentence" of five years' probation, the district court did not err in ruling as it did.[4] *See id.*

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[4]Even viewed as an upward departure, however, the sentence imposed was not unlawful: the district court had the authority to act as it did, there was no clear error in its findings supporting the existence of the

Endicott's argument that the district court improperly weighed conduct outside the scope of the order to show cause is equally meritless. The show cause order placed him on notice that he had violated a condition of his probation; he consented to the search of his vehicle which revealed both methamphetamine and a substance to mask the presence of methamphetamine in urine; he does not dispute the fact that his urinalysis tests indicated the presence of methamphetamine; he admitted to the arresting officers that he had been purchasing and using methamphetamine within a month of his release on probation the previous year; and he admitted in open court to possessing and using methamphetamine.

In light of these considerations, the district court's finding that "there's possession for use, but not for distribution" as a ground for revoking probation was not clearly erroneous. For these same reasons, we also find that the evidence was sufficient to show that Endicott violated a condition of his probation by possessing and using methamphetamine.

Because we find no merit to any of the appellants' remaining arguments, the convictions and sentences appealed from are all AFFIRMED.

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relevant circumstances (viz., that Endicott had possessed methamphetamine while on probation), and the extent of the departure was reasonable. *See United States v. Pascucci*, 943 F.2d 1032, 1038 (9th Cir. 1991.)